

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PATRICK E. WAGNER

Claimant

VS.

KANSAS SAND & CONCRETE, INC.

Respondent

AND

LIBERTY MUTUAL INSURANCE

Insurance Carrier

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Docket No. 1,064,870

ORDER

Respondent and its insurance carrier (respondent) request review of the April 30, 2013, preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders (ALJ).

APPEARANCES

James E. Benfer, III, of Topeka, Kansas, appeared for the claimant. James K. Blickhan, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopts the same stipulations as did the ALJ and considered the same record, consisting of the transcript of Preliminary Hearing dated April 30, 2013, with exhibits attached, and the documents of record filed with the division.

ISSUES

The ALJ found claimant entitled to medical care and designated Dr. Michael Schmidt as the authorized treating physician. Temporary total disability was ordered paid at a rate of \$353.35 per week from March 21, 2013, until claimant is released to return to work and has been offered accommodated work within temporary work restrictions or has attained maximum medical improvement or until further order. The ALJ determined, based

upon the opinion of Dr. Schmidt, that the accident of March 21, 2013, was the prevailing factor for claimant's current left knee condition and need for treatment.

Respondent appeals, arguing claimant's injury did not arise out of and in the course of his employment and that the injury is not compensable under the Workers Compensation Act (Act). In addition, respondent argues claimant failed to sustain his burden of proof that the accident as described was the prevailing factor for claimant's left knee condition and need for treatment.

Claimant argues that the Order be affirmed.

FINDINGS OF FACT

Claimant's job for respondent was as a mixer/driver, which required him to get in and out of a truck. On May 21, 2013, claimant pulled up to a job site and, as he began to get out of the truck, he felt a pop in his left knee. He felt immediate pain and was not able to move his leg. Claimant never made it out of his truck and had to have help getting his left foot back onto the floorboard of his truck. The incident was reported to Dave, the dispatcher, and claimant stated that he was going to need assistance. An ambulance was called and claimant was taken to the hospital. Claimant described the accident during his preliminary hearing testimony as follows:

Q. Okay. And again, in your own words, tell the Court how you were injured?

A. Okay. Well, I pulled up to the job site and there was a truck ahead of me so I was sitting there while I waited for a little bit sitting in the cab. And I decided, well, since we was going to run a pump, that I would go out and unfold my shoots. So when I opened up the door, I bent my left knee back in a bent position to step up to lift myself up out of the seat. And when I did that, I felt a -- pop in my knee.

Q. Was the weight of your body on your left leg when that happened?

A. Yeah.

Q. And were you --

A. I was standing up out of the seat.

Q. Were you twisting when that happened?

A. Yes, I was twisted in the truck to get out of the truck.

Q. Did you feel discomfort when your leg popped?

A. Yeah, a lot of pain.¹

. . .

Q. And that's when you started to try to get out of the seat by simply standing up out of the seat?

A. Yes.

Q. And it's when you were standing up like this to get out of the seat, that's when your knee locked up on you?

A. No. It -- it locked up when I was standing -- getting ready to stand up and I twisted to step out of the truck, that's when it -- that's when the knee popped.

Q. So let me go through this again. You're -- you're seated and now you're going to get up and you're using -- did you use one leg or both legs to try to get yourself out of your seat?

A. Well, I was using both my legs to get up. And then I -- I twisted to turn to exit the vehicle and when I twisted, that's when my knee popped.

Q. And that was your left knee.

A. My left knee.

Q. So you never exited the vehicle?

A. No.

Q. You never attempted to climb down a step on the vehicle?

A. I couldn't move after it popped, I couldn't move it.

Q. This was all from just standing up from your seat, correct?

A. Yes, yes.²

At the hospital, claimant was given medication and his leg was straightened out. He did not have any x-rays. Claimant was told to follow-up with orthopedic surgeon Michael J. Schmidt, M.D. While claimant was at the hospital, claimant spoke with Mr. Toman, a representative for respondent, and shared that he had a fall earlier in 2011

¹ P.H. Trans. at 8-9.

² P.H. Trans. 25-26.

where he injured his knee. Claimant was able to continue working after the 2011 injury. He also admitted to having surgery on his right knee in the early 90s, and surgery on the left knee in the late 90s. Both procedures were successful and claimant had no further problems until this new incident in 2013. During the seven years claimant has worked for respondent, he has not missed any work because of a knee problem.

Claimant met with Dr. Garrett for three or four appointments and was told that he had damage to his left knee, but Dr. Garrett did not determine what caused the damage.

Claimant has not worked since the accident because he has not been released to return to work. By letter of April 9, 2013, Dr. Schmidt was asked by claimant's attorney whether claimant's action as he was attempting to exit his truck was the prevailing factor in his current need for medical treatment and physical restrictions. Dr. Schmidt provided his response at the bottom of the attorney letter stated as follows:

I agree the primary/prevaling factor causing Mr. Wagner's current need for medical treatment and medical restrictions is the mechanism of injury caused by twisting and loading the left knee as he exited his truck on March 21, 2013.³

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(f)(1)(2)(B)(3)(A) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

...

(2)(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

³ P.H. Trans., Cl. Ex. 1 at 9 (April 9, 2013, letter from claimant's attorney).

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2012 Supp. 44-508(g)(h) states:

(g) “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

Respondent contends claimant’s actions on the date of accident were no more than normal activities of daily living. Claimant simply attempted to stand up and his knee gave out. However, a close review of claimant’s testimony shows more than the simple act of standing up. Claimant described planting his feet, standing up and twisting, all before the knee pain began. These are all actions exceeding the simple act of standing up.

The Kansas Supreme Court addressed this issue in *Bryant*.⁴ In *Bryant*, the claimant suffered a low back injury in 1997, leading to surgery in 1998. The claimant began working for the respondent in 2001, missing several days due to persistent back pain. On March 2, 2003, *Bryant* stooped over to grab a tool out of his tool bag, and when he twisted back to work, he felt a pop or snap in his back and experienced a sudden severe increase of pain in his lower back. He returned to work on May 13, 2003, and while working on an air conditioner, he stooped down to weld and felt an explosive increase in pain. He was diagnosed with a severe low back injury and underwent a multi-level fusion in his back. Both the ALJ and the Board awarded *Bryant* benefits. But, both were reversed by the Kansas Court of Appeals, which found claimant precluded from compensation because his injuries were the result of the “normal activities of daily living.”⁵

⁴ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P3d 255 (2011).

⁵ *Id.* at 587.

The Supreme Court reversed the Court of Appeals, finding *Bryant* was not engaged in the normal activities of day-to-day living when he bent down for his tool belt or to carry out a welding task. The Court analyzed activities of daily living as follows:

“Although no bright-line test for what constitutes a work-injury is possible, the proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life’s ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one’s job. “The right to compensation benefits depends on one simple test: Was there a work-connected injury? . . . [T]he test is not the relation of an individual’s personal quality (fault) to an event, but the relationship of an event to an employment.” (1 Larson’s Workers Compensation Law, § 1.03[1] (2011)).

Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the [sic] whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement bending, twisting, lifting, walking, or other body motion but looks to the overall context of what the worker was doing . . .”⁶

Here, claimant was attempting to exit his truck, standing, twisting and turning, when his knee popped and he felt immediate pain. These movements relate directly to the task at hand required by his employment duties with respondent. The finding by the ALJ that claimant suffered an injury by accident which arose out of and in the course of his employment, and that accident is the prevailing factor causing the injury, medical condition and resulting disability is affirmed.

Respondent further argues the opinion of Dr. Schmidt must be disregarded as the description of the accident provided the doctor differed from claimant’s testimony because claimant never exited the truck and never stepped down. Respondent is correct that claimant never exited the vehicle. However, his left foot did, at some point, exit the vehicle as he had to ask for help getting his left foot back into the truck. Dr. Schmidt’s opinion that the accident in question is the prevailing factor causing claimant’s current need for treatment and medical restrictions persuades this Board Member to affirm the Order of the ALJ.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

⁶ *Id.* at 595-596.

⁷ K.S.A. 2012 Supp. 44-534a.

as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has sustained his burden of proving the accident on March 21, 2013, arose out of and in the course of his employment with respondent and is the prevailing factor leading to claimant's injury and resulting need for medical treatment. The award of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated April 30, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2013.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: James E. Benfer, III, Attorney for Claimant
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Rebecca Sanders, Administrative Law Judge